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Constitutional Law - First Amendment - States May Not Prohibit Mere Private Possession of Obscene Material. Stanley v. Georgia (U.S. 1969)

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Whatever the outcome:

> The statute as here applied creates a clash between law and morality for which no exigency exists . . . . The law cannot be adequately enforced by the courts alone, or by courts supported merely by the police and the military. The true secret of legal might lies in the habits of conscientious men disciplining themselves to obey the law they respect without the necessity of judicial and administrative orders. When the law treats a reasonable, conscientious act as a crime it subverts its own power. It invites civil disobedience. It impairs the very habits which nourish and preserve the law.[46]

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CONSTITUTIONAL LAW—FIRST AMENDMENT—STATES MAY NOT PROHIBIT MERE PRIVATE POSSESSION OF OBSCENE MATRIAL. *Stanley v. Georgia* (U.S. 1969).

An investigation into the suspected bookmaking activities of Robert Eli Stanley led to the issuance of a search warrant by a United States Commissioner. Under the authority of this warrant, Stanley's residence was searched. Little evidence of illegal wagering was discovered, but three reels of motion picture film were found in a desk drawer in Stanley's bedroom. After the investigators viewed the films on Stanley's projector, the reels were seized as contraband obscene matter.[1] Stanley was arrested, indicted for possession of obscene matter in violation of Georgia law,[2] tried and convicted in the Superior Court of Fulton County.

The Supreme Court of Georgia[3] affirmed the conviction reasoning that obscenity is not entitled to the protection of the first amendment under the rule of *Roth v. United States*[4] and that

46. 297 F. Supp. at 910-11.

1. Appellant did not argue that the materials seized were not obscene. Therefore, the Court assumed, for purposes of decision, that the films would be classified as obscene matter under any presently accepted test. 394 U.S. at 557 n.2.

2. GA. CODE ANN. § 26-6301 (Supp. 1968), which reads in pertinent part, "Any person . . . who shall knowingly have possession of . . . any obscene matter . . . shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony . . . ."

3. *Cf.* Stanley v. State, 224 Ga. 259, 161 S.E.2d 309, 312 (1968). The exact ground was not urged until argument before the United States Supreme Court. Stanley v. Georgia, 394 U.S. 557, 560 (1969).

4. Roth v. United States, Alberts v. California, 354 U.S. 476 (1957).

the States, subject only to other constitutional limitations,[5] are free to deal with obscenity in any manner deemed necessary.

On appeal to Supreme Court of the United States, *held,* reversed: The Georgia obscenity statute, insofar as it punishes the mere private possession of obscene matter, violated the defendant's rights of privacy under the first and fourteenth amendments. *Stanley v. Georgia,* 394 U.S. 557 (1969).

In 1957, the United States Supreme Court for the first time was squarely presented with the issues of whether or not obscenity statutes[6] might violate the first amendment rights of freedom of speech and of the press in *Roth v. United States.* The dispositive question there was whether obscene material is an utterance within the area of protected speech and press. The Court first stated that:

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees, unless excludable because they encroach upon the limited area of more important interests.[7]

The Court then proceeded to adopt a definition of obscenity as that material, which when taken as a whole, (1) appeals to the prurient interests of the average person, and (2) when applying contemporary community standards, goes substantially beyond customary limits of candor in the description or representation of such matter.[8] The Court found that such material is utterly without redeeming social importance, and is not an utterance within the protection of the first amendment rights of speech and press.[9]

Thus, *Roth* provided a line separating protected from unprotected speech. If the material before the Court was determined to be obscene, it fell beneath that line and could be

5. The Georgia court found that the search was reasonable and that no rights of the defendant had been violated. This issue was not considered in the majority opinon of the Supreme Court, but Justices Stewart, Brennan and White would have reversed the conviction on the basis of an illegal search and seizure. 394 U.S. at 569-72.

6. 18 U.S.C. § 1461 (1966); CAL. PENAL CODE § 311(3), (4) (West 1955) repealed by CAL. STATS. 1961, ch. 2147 § 1.

7. 354 U.S. at 484.

8. *Id.* at 487 & n.20, approving MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1956). That section appears not to have been included in the Proposed Official Draft of 1962.

9. 354 U.S. at 485.

suppressed without any determination of the clear and present danger that would otherwise result.[10] The problem was thought by the Justices to be that of classification of material as obscene or not obscene. Once the status of the matter was established, the proper result followed easily.

Since 1957, the *Roth* rule has been stated time and time again, with seeming lack of qualification. However, *Roth* dealt with the commercial exploitation of obscene material through the mails. Subsequent cases have dealt with possession of obscene matter with intent to sell or distribute,[11] prosecutions for the actual sale or distribution of the prohibited matter,[12] prevention of distribution or mailing of obscenity,[13] procedures for predistribution approval of material,[14] seizure of obscene matter kept for commercial purposes,[15] and sale of pornographic material to minors.[16]

In this series of cases, a few emerged to expose the inadequacies of the *Roth* definitional approach. It became necessary to modify the definition and to create exceptions to the definition as modified in order for the Court to reach what it considered a just result. The problem first appeared in *Memoirs v. Massachusetts,*[17] where the Supreme Court was confronted with a novel that was obscene by a strict application of the *Roth* definition; however, the novel was of some slight literary worth. This presented a dilemma, for *Roth* had proclaimed that matter fitting the definition was therefore "utterly without redeeming social importance."[18] In order to escape the problem, the Court found it necessary to redefine obsenity. Whereas in *Roth,* material

10. *Id.* at 486-87.

11. Redrup v. New York (Gent v. Arkansas), 386 U.S. 767 (1967); Mishkin v. New York, 383 U.S. 502 (1966); Smith v. California, 361 U.S. 147 (1959).

12. Redrup v. New York, 386 U.S. 767 (1967); Ginzburg v. United States, 383 U.S. 463 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964).

13. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

14. Freedman v. Maryland, 380 U.S. 51 (1965).

15. Marcus v. Search Warrant, 367 U.S. 717 (1961); *see also* A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964); Memoirs v. Massachusetts, 383 U.S. 413 (1966) (proceeding in equity against a book, but possession was criminal only with an intent to distribute).

16. Ginsberg v. New York, 390 U.S. 629 (1968); *cf.* Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968).

17. 383 U.S. 413 (1966).

18. 354 U.S. at 484.

was utterly without redeeming social value because it was obscene; after *Memoirs,* an utterance must be found to be utterly without redeeming social value as a pre-condition to declaring it obscene. By changing the inadequate definition, the Court elevated material that would have been obscene under *Roth* to a position of protected speech.[19]

Subsequent to *Memoirs,* the Court was faced with three situations presenting the opposite problem. In all three cases, the material involved was not abstractly obscene as measured by *Roth* and *Memoirs,* however, the actions of the defendants in marketing the material appeared reprehensible, but the Court could not prohibit the act unless the material involved was found obscene.

In *Ginzburg v. United States,*[20] the Court held that material could become obscene by the defendant's manner of presentation and his form of advertising. Ginzburg can be classified as a panderer, that is, he presented the material as a whole so that it would appeal primarily to the prurient interests of prospective customers. The titillating aspects of the matter were deliberately and calculatingly emphasized. In doing these things, Ginzburg announced the obscenity of his material to the Court.[21] In *Mishkin v. New York,*[22] the Court held that when matter is directed to a particular, clearly defined group, rather than to the general public, the prurient interest of that group may be substituted for that of the average person. To some extent *Mishkin* is analogous to *Ginzburg,* for in both, the defendants were directing material to a certain audience on the basis of the appeal of the matter to that group.

19. The *Roth-Model Penal Code* test for obscenity replaced the test enunciated by Regina v. Hicklin, L.R. 3 Q.B. 360 (1868) which would permit matter to be declared obscene on the basis of the effect of isolated passages on particularily susceptible persons. *Memoirs* can be viewed as a complete inversion of that standard, for under *Memoirs* the material can be salvaged because of some slight social value.

20. 383 U.S. 463 (1966).

21. The situation was exactly opposite to that in *Memoirs.* In *Memoirs,* the importer or distributor of the novel with considerable pornographic content had legitimate motives in acting; that is, he desired to sell the novel for its literary value rather than for its prurient content. In fact, the Court in *Memoirs* stated that the circumstances of production, sale and publicity are relevant in determining whether or not the publication or distribution of the book is protected. When the purveyor's sole emphasis is on the erotically arousing aspects of the work, the Court will accept the evaluation of the defendant at face value. 383 U.S. at 420-21.

22. 383 U.S. 502 (1966).

In *Ginsberg v. New York*,[23] the defendant was directing material to a specified audience consisting of minors. The New York statute[24] prohibiting the sale of material obscene to minors was upheld to a great extent because of the recognized state concern for the welfare of minors in protecting them from exposure to pornography before they are fully developed sociologically and psychologically.[25] As in *Mishkin*, the Court held that the prurient appeal of the group toward which the material is directed may be utilized in the definition of obscenity.[26]

Thus the Court has had to improvise, expand and contract the definition of obscenity so as to work within the *Roth* framework and still reach a result compatible with the first amendment. In *Ginzburg*, *Mishkin* and *Ginsberg*, the defendants were all in some sense engaged in pandering, that is, each was engaged in conduct exploiting the cravings of a certain group of individuals for material with pornographic content. The cases thus seem to suggest that the Court has accepted Chief Justice Warren's admonition that "[t]he conduct of the defendant is the central issue, not the obscenity of a book or picture."[27]

Stanley v. Georgia, unlike the preceeding cases, did not involve any commercial exploitation of obscene material, but involved a conviction for the mere possession of obscenity. There has been determined a sufficiently valid public interest in dealing with the regulation of commercial uses of obscenity,[28] but:

> [Stanley asserted] the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He [asserted] the right to be free from state inquiry into the contents of his library.[29]

23. 390 U.S. 629 (1968).

24. N.Y. PENAL LAW § 484-h (McKinney 1967).

25. Ginzburg v. United States, 383 U.S. at 498 n.1.

26. In United States v. 31 Photographs, 156 F. Supp. 350, 354 (S.D.N.Y. 1957), the court found that the average persons test of *Roth* was based on the fact that in *Roth* the materials were presented to the general public. This rule was felt to be nothing more than a particular application of the "all those whom the material is likely to reach" test enunciated in United States v. Levine, 83 F.2d 156, 157 (2d Cir. 1936). This appears to have been adopted by the Supreme Court in *Ginzburg*, *Mishkin* and *Ginsberg*.

27. Roth v. United States, 354 U.S. 476, 495 (Warren, C.J., concurring).

28. The Court stated: "[T]here is always the danger that obscene material might fall into the hands of children, (citation omitted), or that it might intrude upon the sensibilities or privacy of the general public." 394 U.S. at 567. In addition to the two above dangers, in Redrup v. New York, 386 U.S. at 769, the Court added pandering of the sort found in *Ginzburg*.

29. 394 U.S. at 565.

Against these interests and rights, Georgia contended that the difficulty of proving actual distribution or intent to distribute made the prohibition of possession of obscene matter a necessary incident to effective state control of distribution. Even if the claimed difficulties did exist, the Supreme Court felt that the need to alleviate the problem could not justify such a serious invasion of fundamental individual rights.[30]

Georgia also argued that "[e]xposure to obsenity may lead to deviant sexual behavior or crimes of sexual violence."[31] This possibility, although slight, is sufficient to justify state action under the *Roth* proposition that obscenity is not protected by the first amendment.[32] The Supreme Court declared, however, that the mere classification or categorization of any matter as obscene is not sufficient justification for an invasion of the personal liberties guaranteed by the first amendment. The state must be able to say more than contact with obscene matter *may* be harmful.[33]

The Court concluded that while the states have broad authority under their police powers to regulate obscenity, such authority does not

> reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own home, what books he may read or what films he may watch.[34]

Without more, *Stanley v. Georgia* vindicates the right of privacy, while leaving the line of cases from *Roth* through *Ginsberg* undisturbed. However, the Court appears to have gone beyond that point in establishing the rule of the case. In establishing Stanley's right to possess obscene material under the first amendment, the Court looked to the concurring opinion of Mr. Justice Brennan in *Lamont v. Postmaster General.*[35] In *Lamont,* a federal statute which authorized the detention and ultimate destruction of unsealed mail which constituted communist political propaganda from foreign countries, unless the addressee indicated to the Post Office Department that he

30. *Id.* at 567-68.
31. *Id.* at 566.
32. *See* text accompanying note 10, *supra.*
33. 394 U.S. at 565-67.
34. *Id.* at 565.
35. 381 U.S. 301, 307 (1965) (Brennan, J., concurring).

desired to receive the material, was held unconstitutional. The matter involved was of such a nature that it could be legitimately created and disseminated.[36] Justice Brennan wrote that although the first amendment does not include any specific guarantee of individual access to publications, the protection of the Bill of Rights extends beyond the specific guarantees to implicit rights, equally fundamental, so that the specific rights are made fully meaningful. The right to distribute and the right to receive the product of speech or the press are among such implicitly fundamental rights.[37]

Unlike *Lamont,* the material involved in *Stanley* was, more likely than not, not protected in its creation and dissemination under existing statutes and judicial opinions. When material may be created and distributed the need for the right to receive logically follows, but if material cannot be created and disseminated, there need be no right of receipt.

The *Stanley* Court stated that the right to receive ideas and information is constant regardless of the social worth of the matter.[38] Furthermore, the right is not limited to the transmission of ideas and information alone. In *Winters v. New York,*[39] the Court found that the line dividing ideas from entertainment is extremely nebulous, if there is such a division at all, for ideas are often contained within the dimensions of entertainment. Such a line, the *Winters* Court stated, is far too elusive for the courts to attempt any demarcation.[40] Furthermore, in *Stanley,* the Court upheld the defendant's right to satisfy both his intellectual and his emotional needs in the privacy of his home.[41] Since entertaining matter would fall within the category of material satisfying the emotional needs of the defendant, the Court seems to say that one may be entertained by "obscene" matter. If entertainment may be seen as a social value, it can be argued that material, even when distasteful to the vast majority of society, could not be declared "obscene" under the *Memoirs* test.[42]

36. The Court also relied on Martin v. City of Struthers, 319 U.S. 141, 143 (1943) where the materials involved were circulars advertising a religious meeting to be held by Jehovah's Witnesses.

37. 381 U.S. at 308.

38. 394 U.S. at 564.

39. 333 U.S. 507 (1948).

40. *Id.* at 510.

41. *See* text accompanying note 29, *supra.*

42. It must be remembered that in *Memoirs,* the literary style and content of the novel

These arguments appear tenuous at first; however, the Court held that Stanley had the constitutional right to receive and possess obscene matter. In order for this right to have any meaning, some other person must be able to exercise a correlative right to create and distribute that material. To invert Mr. Justice Brennan's argument, just as the right to create and disseminate is without meaning unless another can receive the communicative product, the right to receive and possess is impotent without another's right to create and disseminate. Therefore, *Stanley, Lamont* and *Winters,* when taken together, appear to authorize and legitimize some form of creation, sale and distribution of pornographic matter.[43]

The Court's refusal to accept the simple classification of matter as "obscene" as sufficient justification for the restriction of first amendment guarantees, indicates quite clearly that the Court has rejected the approach created by *Roth.* The result seems to be that the creation, dissemination and receipt of "obscene" matter is entitled to the protection of the Bill of Rights as is all other speech; in other words—speech is speech. However, the dangers inherent in the conduct of the defendants in the prior cases, may well be sufficiently grave so as to justify state action to regulate such conduct even though speech is somewhat infringed. For example, in the case of sales to minors, the Court in *Ginsberg* recognized that obscene material is especially appealing to the minor because of his immature state and his desire to gain a degree of sexual release. Because of this, the minor is not able to make rational, informed choices whether to accept or reject the matter. The state, therefore, may remove the minor from that situation by prohibiting the sale to minors of materials obscene to the minor.[44]

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imparted some social worth to the book, that is, the novel was intrinsically valuable. In the case of entertainment, the result produced through the use of the material may have some social value even though the matter is of itself valueless.

43. The sale would have to be restricted much in the manner as is the sale of alcoholic beverages. There could be no sales to minors, no solicitation or advertising so as to impinge upon the privacy of others and no pandering of the matter. *See* note 28, *supra.*

44. It may also be argued that in order to realize the value of uninhibited speech, so that speech will answer speech and propaganda will combat propaganda, the minor must first be provided with an adequate basis for evaluating the material presented him and to participate in the dialogue. *See* Dennis v. United States, 341 U.S. 494, 503 (1951). As the nucleus of society, the family should be entitled to the first opportunity to prepare the minor for adult life by providing him with values deemed desirable by the family unit.

If *Stanley v. Georgia* is extended beyond the limited express holding of the case so that creation and distribution of "obscene" material is permitted, and if the function of the state in this area is that of regulation of conduct where the dangers involved are sufficiently great so as to permit some limited suppression of speech, questions arise in the context of private possession of pornographic material as to what uses the possessor may put that material. Could Stanley exhibit his films to the membership committee of some fraternal organization as a lever to gaining admittance? May the possessor show the material to his own minor children[45] or to the minor children of others with or without parental consent? May he view or project objectionable films in such a manner that the neighbor's wife cannot help but see them, e.g., through the kitchen window while washing the supper dishes? Could he use such material with a mixed married group as a prelude to some socially unaccepted sexual practices?

Further questions arise when the possessor has "satisfied his intellectual and emotional needs."[46] Perhaps he would wish to save the material and periodically peruse it as one does a favorite novel, but that is doubtful. What then may he do with it? Could he trade such matter, give it to a friend or sell it to another individual (perhaps a minor) for the other's personal use? Would he be able to advertise his desire to trade or sell in the local newspaper?

There are, no doubt, certain actions that the private possessor could not undertake in the use of his "obscene" material. It would appear that the same dangers are present in a non-iommercial as well as a commercial setting. Public concern about the evils of pandering and sales or exhibitions to minors is sufficiently great to justify prohibition or regulation of any acts with regard to the product of speech that fall within those classifications. Equally important is the right of privacy of those who do not desire to suffer exposure to the matter but who cannot avoid exposure. Most likely, such conduct may be regulated, without an unconstitutional infringement upon first amendment rights, even after *Stanley v. Georgia.*

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45. The Court in *Ginsberg* was of the opinion that the statute which prohibited sales to minors did not bar the parent who wished to expose his child to pornographic material from doing so. 390 U.S. at 639.

46. 394 U.S. at 565.